

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2012-KA-01524-COA

**WILLIAM EDWARD SNOWDEN A/K/A
WILLIAM E. SNOWDEN**

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

DATE OF JUDGMENT:	08/29/2012
TRIAL JUDGE:	HON. VERNON R. COTTEN
COURT FROM WHICH APPEALED:	NEWTON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES B. EVERETT
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ELLIOTT GEORGE FLAGGS
DISTRICT ATTORNEY:	MARK SHELDON DUNCAN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	CONVICTED OF AGGRAVATED ASSAULT AND SENTENCED TO TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH FIFTEEN YEARS SUSPENDED AND FIVE YEARS TO SERVE
DISPOSITION:	REVERSED, VACATED, AND REMANDED - 02/11/2014
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

ROBERTS, J., FOR THE COURT:

¶1. A jury sitting before the Newton County Circuit Court found William Edward Snowden guilty of aggravated assault. The circuit court sentenced Snowden to twenty years in the custody of the Mississippi Department of Corrections with fifteen years suspended and five years to serve. Snowden appeals and raises five issues. However, we find merit to one

of Snowden's issues. Because that issue is outcome determinative, his remaining four issues are moot. In particular, we find that the circuit court erred by allowing the prosecution to proceed on an indictment that specifically charged Snowden with aggravated assault under Mississippi Code Annotated section 97-3-7(2)(a) (Rev. 2006) when the indictment did not include all of the essential elements of a conviction under that provision. Therefore, we reverse the circuit court's judgment of conviction for aggravated assault and vacate Snowden's sentence of twenty years in the custody of the MDOC with fifteen years suspended and five years to serve. But because the jury inherently found Snowden guilty of simple assault, we remand this matter to the circuit court so it can sentence Snowden accordingly.

FACTS AND PROCEDURAL HISTORY

¶2. During February 2011, Nelson Smith and other members of a church outreach group provided rides home for people who needed rides home after celebrating Mardi Gras in the vicinity of Meridan, Mississippi. After Smith stopped providing rides to others, he drove west on I-20 on his way to his home in Chunky, Mississippi. At approximately 12:45 a.m. on February 27, 2011, Smith got off of I-20 at the Chunky exit ramp. When he drove onto the exit ramp, he noticed a car driving "up behind [him] real fast." Smith thought that "something's going on with this person, because [he] was driving really crazy." Smith yielded the exit ramp to the driver behind him. Specifically, Smith moved left off of the exit ramp. The car behind Smith drove to the end of the exit ramp and turned right onto "Chunky-Duffy Road."

¶3. As soon as Smith moved back onto the exit ramp, a white pickup truck drove behind

him and let him into traffic. When Smith got to the end of the exit ramp, the driver of the white pickup truck passed him and turned right onto Chunky-Duffy Road. In other words, the driver of the white pickup truck went the same direction as the driver in the first car. According to Smith, the driver of the white pickup truck “just took off” after he passed Smith.

¶4. Smith rolled down his window and proceeded in the same direction as the other two vehicles. A short distance later, Smith noticed that the white pickup truck had driven halfway down a driveway to a house on the left. Smith thought the driver of the white pickup truck was lost. As Smith drove past the driveway, he heard what he described as “three pops.” Smith first thought the sounds had come from his own vehicle. According to Smith, his right arm began “throbbing and blood start[ed] gushing out of [his] arm.” Smith realized that he had been shot. Because he was less than two miles from his own home, Smith drove there rather than a hospital. Smith’s wife drove him to Rush Hospital in Meridian.

¶5. Deputy Jeremy Pinson of the Newton County Sheriff’s Department was dispatched to Rush Hospital. Just before 2:00 a.m., Deputy Pinson spoke to Smith. Smith explained that he had been driving past a house on Chunky-Duffy Road just north of the exit off of I-20 when he was shot in the upper part of his right arm. Shortly after he interviewed Smith, Deputy Pinson went to the house that Smith described. Snowden lived in the house with his wife and stepson. Deputy Pinson explained that he was investigating a report that someone had been shot. Snowden admitted that he was responsible for the gunshots that occurred earlier that night. According to Snowden, he fired warning shots from a .22 caliber rifle because his stepson, Chris McCans, had been pursued by unidentified people as McCans was

driving home from work. Snowden explained that he had been trying to make his stepson's pursuers leave the property.

¶6. After speaking to Deputy Pinson at Rush Hospital, Smith had been transferred to University Medical Center in Jackson, Mississippi, where he underwent exploratory surgery to determine the significance of the damage to his arm. Smith was discharged later that day. Deputy Pinson called Smith while Smith was riding home from Jackson. Deputy Pinson relayed Snowden's claim that he had been firing warning shots because two people had chased his stepson home. Smith initially said he did not want to press charges against Snowden, but Smith later changed his mind.¹

¶7. On June 5, 2012, Snowden was indicted and charged with aggravated assault.

Specifically, the indictment stated:

Snowden . . . did willfully, unlawfully, [and] feloniously cause *bodily injury* to . . . Smith . . . knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life with a deadly weapon, to-wit: a rifle, by shooting . . . Smith with [the] rifle, . . . being a means likely to produce death or serious bodily harm, contrary to and in violation of [Mississippi Code Annotated s]ection 97-3-7(2)(a) [(Rev. 2006)].

(Emphasis added). On the date of the crime and the date the indictment was filed,² section

¹ Smith thought that his health insurance provider would not pay the costs of his treatment if he did not press charges against Snowden. Smith never explained why he came to that conclusion.

² Effective July 1, 2012, the Mississippi Legislature amended section 97-3-7(2)(a), which now provides, in pertinent part:

A person is guilty of aggravated assault if he (i) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; [or] (ii) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to

97-3-7(2)(a) provided, “A person is guilty of aggravated assault if he . . . attempts to cause *serious bodily injury* to another, or causes *such injury* purposely, knowingly[,] or recklessly under circumstances manifesting extreme indifference to the value of human life[.]” (Emphasis added). Mississippi Code Annotated section 97-3-7(2)(b) (Rev. 2006) provided that “[a] person is guilty of aggravated assault if he . . . attempts to cause or purposely or knowingly causes *bodily injury* to another with a deadly weapon or other means likely to produce death or serious bodily harm[.]” (Emphasis added). Snowden filed two pretrial motions to dismiss the indictment. Snowden argued that the indictment was duplicitous because it attempted to charge him with both aggravated assault and simple assault. Snowden also argued that the indictment was fatally flawed because it attempted to charge him with some blended form of aggravated assault that is cobbled together with incomplete aspects of both section 97-3-7(2)(a) and section 97-3-7(2)(b). However, the circuit court overruled both of Snowden’s motions to dismiss the indictment.

¶8. At trial, the prosecution called Smith and Deputy Pinson as witnesses. After the prosecution rested its case-in-chief, Snowden called McCans as his first witness. McCans testified that the night Smith was shot, McCans had been working at a restaurant in Meridian. McCans stopped at a gas station on his way home. According to McCans, while he was at the gas station, two men in a white pickup truck aimed a laser pointer at him. McCans left

produce death or serious bodily harm”

Miss. Code Ann. § 97-3-7(2)(a) (Supp. 2013).

the gas station. The two men in the white pickup truck followed him on the interstate, despite the fact that McCans drove approximately ninety to one hundred miles per hour.

According to McCans:

[O]nce I got to the Chunky exit, there was a[n] eighteen wheeler in my way, so I couldn't get off right away, and as I slowed down, they pulled up on the left-hand side of me and struck my window with a - - some - - a long metal pole, it looked like. Something like that. And at that time, I just took off off the exit, around the vehicle, and headed toward my driveway.

McCans encountered Smith's car shortly after his pursuers hit his window with a "metal pole." McCans testified that he used his cellular phone to call his mother, Elayne Snowden, while he was being chased. Elayne corroborated McCans's testimony that he called her while he was being chased. Elayne further testified that her husband, Snowden, went outside when McCans pulled into the driveway, and Snowden "fired . . . warning shots." According to Elayne, she saw at least one of the occupants of the white pickup truck fire a weapon.

¶9. Snowden also testified. Snowden explained that he "had to do something to protect [his] family." According to Snowden, he "just fired warning shots and that was it." Snowden elaborated that he "[j]ust pointed the rifle out and pulled the trigger." Snowden testified that his last warning shot was a misfire. He speculated that Smith could have been hit by that shot. Snowden went on to testify that he did not intend to shoot Smith or anyone else, and he was "[v]ery sorry that it happened." Snowden rested after he testified, and the prosecution finally rested.

¶10. During the conference on jury instructions, Snowden objected to the following jury instruction, which was designated as jury instruction S-1:

The [c]ourt instructs the [j]ury that if you believe from the evidence in this

case beyond a reasonable doubt that at the time and place charged in the indictment and testified about, . . . Snowden, did willfully, unlawfully, [and] feloniously cause bodily injury to Nelson Smith, a human being, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life with a deadly weapon, to-wit: a rifle, by shooting . . . Nelson Smith with [the] rifle, . . . being [a] means likely to produce death or serious bodily harm, then it is your duty to find [Snowden] guilty as charged.

Snowden argued that jury instruction S-1 did not adequately describe a violation of section 97-3-7(2)(a), which requires proof of “serious bodily injury” rather than “bodily injury.” Snowden also argued that jury instruction S-1 was improper because it included language that pertained to a conviction for aggravated assault under section 97-3-7(2)(b). However, the circuit court found no merit to Snowden’s arguments and gave jury instruction S-1 as written. The jury was not instructed that it had to find that Snowden caused Smith serious bodily injury. The jury found Snowden guilty of aggravated assault. Snowden appeals.

ANALYSIS

¶11. Snowden claims the circuit court erred when it allowed the prosecution to proceed on a defective indictment. According to Snowden, the indictment did not adequately charge him with aggravated assault under section 97-3-7(2)(a). “The issue of whether an indictment is fatally defective is an issue of law and deserves a relatively broad standard of review by this Court.” *Russell v. State*, 924 So. 2d 604, 607 (¶3) (Miss. Ct. App. 2006). “As the issue involves a question of law, this Court applies a de novo standard of review.” *Id.*

¶12. The indictment against Snowden states:

Snowden . . . did willfully, unlawfully, [and] feloniously cause *bodily injury* to . . . Smith . . . knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life with a deadly weapon, to-wit: a rifle, by shooting . . . Smith with [the] rifle, . . . being a means likely to produce death or serious bodily harm, contrary to and in violation of

[Mississippi Code Annotated s]ection 97-3-7(2)(a) [(Rev. 2006)].

(Emphasis added). As previously mentioned, at the time that Snowden was indicted, section 97-3-7(2)(a) provided that “[a] person is guilty of aggravated assault if he . . . attempts to cause *serious bodily injury* to another, or causes *such injury* purposely, knowingly[,] or recklessly under circumstances manifesting extreme indifference to the value of human life[.]” (Emphasis added). The indictment did not accuse Snowden of causing serious bodily injury to Smith. And through jury instruction S-1, the circuit court instructed the jury that it could find Smith guilty of aggravated assault if it found that Snowden “willfully, unlawfully, [and] feloniously cause[d] bodily injury to . . . Smith . . . knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life with a deadly weapon.”

¶13. When Snowden was indicted, section 97-3-7(2)(b) provided that “[a] person is guilty of aggravated assault if he . . . attempts to cause or purposely or knowingly causes *bodily injury* to another with a deadly weapon or other means likely to produce death or serious bodily harm[.]” (Emphasis added). But Snowden was specifically indicted under section 97-3-7(2)(a). The indictment did not charge him with aggravated assault under section 97-3-7(2)(b).

¶14. In *Stevens v. State*, 808 So. 2d 908, 920 (¶36) (Miss. 2002), a defendant claimed that an indictment for aggravated assault was fatally defective because it did not specifically accuse him of violating subsection (2)(a) or (2)(b) of section 97-3-7. The Mississippi Supreme Court held that “it necessarily follows that [Stevens] was charged under both subsections” of section 97-3-7(2). *Id.* But in this case, the prosecution specifically indicted

Snowden under section 97-3-7(2)(a). Consequently, the prosecution was obligated to prove that Snowden caused “serious bodily injury . . . purposely, knowingly[,], or recklessly under circumstances manifesting extreme indifference to the value of human life[.]” Miss. Code Ann. § 97-3-7(2)(a).

¶15. This Court has previously found that a circuit court did not commit plain error when it allowed a defendant to be convicted of aggravated assault under an indictment that blended language from section 97-3-7(2)(a) and section 97-3-7(2)(b). *Johnson v. State*, 910 So. 2d 1174, 1180 (¶20) (Miss. Ct. App. 2005). In *Johnson*, this Court held that the defendant’s conduct “plainly, clearly, and obviously would qualify as aggravated assault under either” section 97-3-7(2)(a) or section 97-3-7(2)(b). *Johnson*, 910 So. 2d at 1179 (¶20). “Yet, even if there was some doubt about the particular subsection of [section] 97-3-7(2) that was intended to be covered by the indictment, . . . our supreme court has held that [section] 97-3-7(2) may be read to cover a ‘considerable latitude’” of varying factual situations. *Johnson*, 910 So. 2d at 1180 (¶20) (citing *Stevens v. State*, 808 So. 2d 908, 920 (¶35) (Miss. 2002)). Ultimately, this Court relied on *Stevens* and held that “the blending of the subsections of [section 97-3-7(2)] is not necessarily a defect and in this case does not warrant reversal.” *Johnson*, 910 So. 2d at 1180 (¶20).

¶16. However, this case is distinguishable from *Johnson*. In this case, Snowden was specifically accused of aggravated assault under section 97-3-7(2)(a). But Snowden was only accused of causing “bodily injury” to Smith. Section 97-3-7(2)(a) required proof of “serious bodily injury.” The Mississippi Supreme Court “has held that an indictment based upon a statutory offense must charge all of the essential elements of the statutory crime and

is void for failure to do so.” *Spears v. State*, 253 Miss. 108, 116, 175 So. 2d 158, 161-62 (1965). The jury was instructed that it could find Snowden guilty of aggravated assault if it found that Snowden caused Smith any “bodily injury.” But the jury never found that Snowden caused Smith “serious bodily injury.”

¶17. The dissent relies on *White v. State*, 958 So. 2d 241, 244 (¶10) (Miss. Ct. App. 2007), and *Johnson v. State*, 94 So. 3d 1209, 1215 (¶¶26-29) (Miss. Ct. App. 2011), to argue for its conclusions that (1) the indictment charged Snowden under both section 97-3-7(2)(a) and 97-3-7(2)(b), and (2) the jury inherently found Snowden guilty of aggravated assault under section 97-3-7(2)(b). With utmost respect for the dissent, we disagree. *White* is of no moment in this case, because it is irrelevant whether Snowden could have somehow derived that when the indictment specifically charged him under section 97-3-7(2)(a), the indictment really meant to charge him under section 97-3-7(2)(b) as well.

¶18. And this case is distinguishable from *Johnson* in that it is legally impossible to affirm Snowden’s conviction for aggravated assault under either section 97-3-7(2)(a) or section 97-3-7(2)(b). It is accurate that “bodily injury” rather than “serious bodily injury” is one of the essential elements of a conviction under section 97-3-7(2)(b). But under section 97-3-7(2)(b), the prosecution was also obligated to present evidence beyond a reasonable doubt that Snowden “purposely or knowingly” shot at either Snowden or the two people who were chasing McCans. The dissent argues that the jury could have inferred that Snowden intended to shoot the occupants of the white pickup truck. The dissent’s reasoning is based on the assumptions that: (1) Snowden “wanted to be ready for his stepson’s pursuers”; (2) Snowden fired three shots, which the majority assumes were in the direction of the occupants of the

pickup truck; and (3) Snowden could have seen Smith's headlights. But there is absolutely no evidence that Snowden fired directly at the occupants of the white pickup truck. For whatever reason, the occupants of the white pickup truck were never identified. They did not even testify. No witness testified that Snowden fired even one shot directly at them. Furthermore, there was no evidence that Snowden had an unobstructed view of approaching traffic on Chunky-Duffy Road. There was no evidence that Smith and the occupants of the white pickup truck would have been in the same line of fire. That is, there is no evidence that Snowden was aiming directly at the occupants of the white pickup truck, and there was no evidence that Smith would have been in the line of fire if Snowden had been aiming at the occupants of the white pickup truck. The jury may reach inferences based on the evidence, but the dissent cites no authority to support the conclusion that the jury may assume or infer facts that are not supported by the evidence. Speculation is the only path available for the jury to possibly infer from this evidence that Snowden "purposefully or knowingly" attempted to shoot the two unknown occupants of the white pickup truck.

¶19. During cross-examination, Deputy Pinson testified that Snowden never told him where he aimed in relation to the two men who were in the pickup truck that pulled into Snowden's driveway. Deputy Pinson also testified that Snowden did not say that he intended to shoot Smith. According to Deputy Pinson, Snowden merely said that he intended to "scare off" the people who had been chasing McCans. Snowden testified that he intended to fire "warning shots," and he "was not firing at anybody." During cross-examination, Snowden reiterated that he "wasn't firing at" the occupants of the pickup truck or Smith. When the prosecution asked Snowden whether he was "just shooting at a vehicle," Snowden responded

that he “wasn’t shoot[ing] at anybody or anything.” Even assuming all evidence and inferences favorable to the prosecution are true, there was simply no evidence that Snowden purposely, knowingly, or intentionally shot at the occupants of the pickup truck or Smith. It follows that there can be no transfer of intent to Smith when there is no evidence that Snowden intended to shoot the occupants of the pickup truck. Stated differently, if there was no evidence of specific intent, then logically there can be no transferred intent. Snowden specifically testified that he did not intentionally shoot Smith and he was “[v]ery sorry that it happened.”

¶20. The dissent finds that the prosecution clearly pursued a transferred-intent theory based on the concept that Snowden intended to shoot the occupants of the white pickup truck. The basis for the dissent’s conclusion is that the prosecution obtained a transferred-intent instruction. However, immediately after the prosecution obtained that instruction, it based its closing argument on the theory that Snowden was guilty of aggravated assault because he acted recklessly when he fired the shot that struck Smith. During the prosecution’s closing argument, the prosecutor said, “I never said to you at any time that Mr. Snowden intentionally shot, knowing it was . . . Smith. I never have argued that, because that’s not the case.” The prosecutor went on to argue that “Snowden’s actions were those that you would have to consider reckless and under a circumstance that would show it was an extreme indifference to human life. And that’s what resulted in his shooting the gun and hitting . . . Smith.” When the prosecutor replied to Snowden’s closing argument, the prosecutor again said “that was a reckless act.” The prosecutor’s final statement to the jury was that “Snowden acted in such a manner that it was reckless and it was in complete indifference to

the [value of] human life.” In other words, the prosecution did not claim nor attempt to prove that Snowden purposefully or knowingly caused bodily injury to Smith, an innocent motorist who unfortunately happened to be in the wrong place at the wrong time. Snowden and Smith did not know one another. The prosecution’s theory was that Snowden either carelessly or negligently fired his .22 caliber rifle over the heads of the two occupants of the white pickup truck in an effort to scare them away from his stepson, but one of the bullets unintentionally struck Smith, a passing motorist, in the arm. Stated differently, the prosecution claimed that Snowden acted “recklessly under circumstances manifesting extreme indifference to the value of human life.” A conviction for aggravated assault under section 97-3-7(2)(b) where a deadly weapon is used to cause a bodily injury does not provide that a defendant’s conduct can be reckless. Instead, such conduct must be purposeful or knowing. Consequently, even if the indictment is legally sufficient to charge Snowden with aggravated assault under section 97-3-7(2)(b), the undisputed proof is insufficient to warrant a conviction under that subsection.

¶21. Notwithstanding the complete absence of evidence that Snowden knowingly, purposely, or intentionally shot Smith, the jury inherently found Snowden guilty of simple assault. “[S]imple assault has been deemed a lesser-included[]offense of the crime of aggravated assault.” *Odom v. State*, 767 So. 2d 242, 245 (¶10) (Miss. Ct. App. 2000). Mississippi Code Annotated section 97-3-7(1) (Rev. 2006) provides that “[a] person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or *recklessly causes bodily injury* to another; or (b) *negligently causes bodily injury to another with a deadly weapon* or other means likely to produce death or serious bodily harm.” (Emphasis added).

Through jury instruction S-1, the jury found that Snowden acted recklessly when he caused Smith's bodily injury. During the hearing on Snowden's pretrial motion to dismiss the indictment, Snowden's attorney argued that Snowden should only be prosecuted for simple assault based on language of the indictment. In his appellate brief, Snowden concedes that he was guilty of simple assault and he should be sentenced accordingly. We agree.

¶22. Utilizing the direct-remand rule, an appellate court may remand a case to the trial court for sentencing on a lesser-included offense where the greater offense was not proved, but the elements of the lesser-included offense were sufficiently met. *Shields v. State*, 722 So. 2d 584, 587 (¶7) (Miss. 1998) (citation omitted). The supreme court explained that the logic behind the direct-remand rule was that "guilt of a true lesser[-]included offense is implicitly found in the jury's verdict of guilt on the greater offense." *Id.* (citations omitted). "The direct-remand rule has also been followed in numerous other state and federal courts, with varying rationales, [based on] either statut[e], rule . . . [,] or inherent power." *Id.* at 585 (¶8). Therefore, we reverse the circuit court's judgment of conviction for aggravated assault, and vacate Snowden's sentence for that charge. However, we remand this matter to the circuit court with instructions to sentence Snowden for simple assault. Based on our resolution of this issue, Snowden's remaining issues are moot.

¶23. THE JUDGMENT OF THE NEWTON COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT IS REVERSED; THE SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH FIFTEEN YEARS SUSPENDED AND FIVE YEARS TO SERVE IS VACATED; AND THIS CASE IS REMANDED FOR RESENTENCING ON THE LESSER-INCLUDED OFFENSE OF SIMPLE ASSAULT IN ACCORDANCE WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO NEWTON COUNTY.

GRIFFIS, P.J., ISHEE, FAIR AND JAMES, JJ., CONCUR. BARNES AND MAXWELL, JJ., CONCUR IN PART AND IN THE RESULT WITHOUT SEPARATE WRITTEN OPINION. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY LEE, C.J., AND CARLTON, J.

IRVING, P.J., DISSENTING:

¶24. The majority reverses Snowden's conviction for aggravated assault because, in the majority's view, the indictment is defective because it does not include all of the elements of aggravated assault as set forth in the charging statute. I believe that the indictment substantially describes the offense of aggravated assault, as it sufficiently informed Snowden that he was charged with willfully and unlawfully causing bodily injury to Smith with a deadly weapon, a rifle, and that the rifle was a means likely to produce death or serious bodily harm. The inclusion of additional language in the indictment did not, in my view, cause Snowden to be misinformed as to the nature and cause of the accusation against him. Therefore, I respectfully dissent. I would affirm Snowden's conviction of aggravated assault.

¶25. Snowden's indictment provides in pertinent part:

William Edward Snowden on or about the 27th day of February did willfully, unlawfully, [and] feloniously cause bodily injury to Nelson Smith, a human being, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life with a deadly weapon, to-wit: a rifle, by shooting the said Nelson Smith with said rifle, said rifle being a means likely to produce death or serious bodily harm, contrary to and in violation of section 97-3-7(2)(a), Miss. Code Ann. (1972).

(Emphasis added).

¶26. The majority notes that the aggravated-assault statute has been amended since the date of the incident and the date of Snowden's indictment. I agree. However, I point out that the amendment did not make any substantive changes to the elements of the aggravated-assault

statute. The amendment only redesignated the subsection's provisions. At the time of the incident, as well as at the time of the indictment, our aggravated-assault statute read as follows:

A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly[,] or recklessly under circumstances manifesting extreme indifference to the value of human life; (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm

Miss. Code Ann. § 97-3-7(2) (Rev. 2006). Conversely, our simple-assault statute read in part as follows: “A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly[,] or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm[.]” Miss. Code Ann. § 97-3-7(1) (Rev. 2006).

¶27. In my opinion, the language in Snowden's indictment that is reflected above in bold is sufficient to charge Snowden with aggravated assault under section 97-3-7(2)(b), as it contains all of the elements specified in that provision of the statute. The fact that the indictment listed the charging statute as 97-3-7(2)(a) and also charged that the action which produced the bodily injury was done “recklessly under circumstances manifesting extreme indifference to the value of human life” is of no consequence, as there is no requirement that the statute be listed in the indictment and the additional language is mere surplusage. It is clear from my review of the record that Snowden fired the rifle “recklessly under circumstances manifesting extreme indifference to the value of human life” because Smith was directly in Snowden's line of fire when he fired. The phrase—recklessly under

circumstances manifesting extreme indifference to the value of human life—simply describes the circumstance of the shooting. It is not ambiguous language that could reasonably be interpreted as describing aggravated assault under section 97-3-7(2)(a), as there is only one incident addressed in the indictment: a shooting with a deadly weapon that caused bodily injury to Smith. Section 97-3-7(2)(b) is the only statute describing aggravated assault that has as one of its elements the use of a deadly weapon or other means likely to produce death or serious bodily harm. While it is true that the indictment also contains language that is only contained in section 97-3-7(2)(a)—recklessly under circumstances manifesting extreme indifference to the value of human life—it is crystal clear that the focus of the indictment is on the shooting with a deadly weapon, not on some other circumstance comprising an aggravated assault by engaging in reckless conduct manifesting extreme indifference to the value of human life.

¶28. This Court addressed an indictment’s defectiveness in *White v. State*, 958 So. 2d 241, 244 (¶10) (Miss. Ct. App. 2007).³ In *White*, the indictment “charged White with a violation of section 97-3-7(2)(a)[.]” *White*, 958 So. 2d at 244 (¶10). However, “[t]he language used in the indictment describing the crime state[d] that [the defendant] unlawfully, willfully, feloniously, purposefully, and knowingly caused bodily injury to [the victim] with a deadly weapon, to wit: by stabbing him with a knife.” *Id.* We acknowledged that the language in the indictment was “more in line with section 97-3-7(2)(b).” Nevertheless, we ultimately determined that the discrepancy was “of no moment” because

³ I note that the author of the opinion in *White* is the author of today’s majority opinion.

[t]he primary purpose of an indictment is to notify an accused of the charges against him in order to allow him to prepare an adequate defense. Furthermore, the incorrect citation of a statute number does not alone render an indictment defective, but rather is mere surplusage and not prejudicial to a defendant.

White, 958 So. 2d at 244 (¶10) (internal citations and quotation marks omitted).

¶29. As stated, Snowden's indictment charged Snowden with violating section 97-3-7(a), but the language used in the indictment, like the indictment in *White*, is more in line with section 97-3-7(b). In *White*, we did not find that citation to a particular subsection of the aggravated-assault statute was fatal even though the language of the indictment closely tracked the language of a different subsection of the statute. I see no reason to hold differently here regarding Snowden's indictment. The indictment was sufficient not only to notify Snowden of the aggravated-assault charges against him, but also sufficient to allow him to prepare an adequate defense against the charges. That is the sole purpose of the indictment. That Snowden fully understood that he was charged with committing aggravated assault with a deadly weapon is reflected by his testimony, that he was not firing at anybody and did not intentionally shoot Smith.

¶30. We held similarly in *Johnson v. State*, 94 So. 3d 1209 (Miss. Ct. App. 2011), a case with a factual scenario similar to the one in the present case. In *Johnson*, the appellant was charged under Mississippi Code Annotated section 97-17-23 (Rev. 2006) with burglary of a dwelling house. *Johnson*, 94 So. 3d at 1214 (¶24). The indictment charged that the appellant

did wilfully, unlawfully, feloniously and burglariously break and enter the dwelling house of Lindsey Callon *wherein goods, merchandise and other valuable items were kept and stored*, with the felonious intent of Johnson to

wilfully, unlawfully, feloniously and burglariously take, steal and carry away said *goods, merchandise and other valuable items* and did in fact take, steal and carry away a rifle, and the personal property of Lindsey Callon, found and kept in said dwelling house.

Id. We noted that “the italicized phrases [in the indictment were contained] only in [Mississippi Code Annotated] section 97-17-33(1) [(Rev. 2006)], the other-buildings burglary statute, and not the dwelling-house burglary statute.” *Johnson*, 94 So. 3d at 1215 (¶25).

¶31. The appellant made three arguments:

[T]he ambiguity over which statute he was being charged forced him to go to trial without notice of the charges against him[;] . . .

the ambiguity require[d] [that] he be resentenced under the lesser statute, [section 97-17-33(1), which carries a lesser sentence; and]

the inclusion of the additional language about “goods, merchandise and other valuable items” created another element to the crime, which was neither proven at trial nor included in the jury instructions.

Johnson, 94 So. 3d at 1215 (¶¶25, 28). In rejecting the appellant’s arguments, we stated:

The purpose of an indictment is to provide the accused reasonable notice of the charges against him so that he may prepare an adequate defense. An indictment must contain the essential facts constituting the offenses charged and shall fully notify the defendant of the nature and cause of the accusation. Any potential ambiguity created by including the phrase “goods, merchandise and other valuable items” is negated by the indictment’s express reference to section 97-17-23 and the specific charging language that [appellant] broke into a “dwelling house.”

* * *

[T]he indictment’s language and its citation to the code section for burglary of a dwelling house fully notified [the appellant] of the offense charged. Indeed, the indictment twice referenced Callon’s “dwelling house.” And the charging document included all essential elements of the dwelling-house burglary—breaking and entering a dwelling house with the intent to commit

a crime. Thus, we find no reversible error in Count I.

* * *

[The] phrase [“goods, merchandise and other valuable items”] is mere surplusage, which could have easily been removed from the indictment without changing the substance of the dwelling-house burglary charge.

Johnson, 94 So. 3d at 1215 (¶¶26-29) (internal citations and quotation marks omitted).

¶32. Just as in *Johnson*, the charging document here—the indictment—includes all of the essential elements of aggravated assault and fully informed Snowden that he was charged with aggravated assault, committed by knowingly shooting Smith with a deadly weapon, a rifle, that caused bodily injury to Smith. The additional language that described the circumstance of the shooting is clearly surplusage, and, as this Court said in *Johnson*, could have easily been removed from the indictment without changing the substance of the aggravated-assault charge.

¶33. The majority says that the dissent relies on *Johnson*, as well as on *White*, to support its conclusions that “(1) the indictment charged Snowden under both section 97-3-7(2)(a) and 97-3-7(b), and (2) the jury inherently found Snowden guilty of aggravated assault under section 97-3-7(2)(b).” Maj. Op. at (¶17). Suffice it to say that the dissent reaches no such conclusion. Simply stated, it is the dissent’s view that *White* and *Johnson* are authority for the proposition that the indictment is legally adequate to have apprised Snowden of the charges against him so as to have enabled him to prepare a defense. As stated, Snowden’s testimony that he was not firing at anybody and did not intentionally shoot Smith provides all the needed proof that Snowden knew that he was being charged with attempting to cause or knowingly causing bodily injury to another with a deadly weapon or other means likely

to produce death or serious bodily harm.

¶34. Finally, the majority says that “even if the indictment is legally sufficient to charge Snowden with aggravated assault under section 97-3-7(2)(b), the undisputed proof is insufficient to warrant a conviction under that subsection.” Maj. Op. at (¶20). To support this proposition, the majority relies on the testimonies of Snowden and Deputy Pinson. It is elemental that the jury is the judge of the credibility of the witnesses. The jury was not required to accept as true Snowden’s testimony regarding his intent or his statement to Deputy Pinson that he only intended to scare off the individuals that had chased his stepson onto Snowden’s driveway.

¶35. This Court recently addressed the manner in which intent may be proven. In *Shaw v. State*, 2011-KA-01536-COA, 2013 WL 5533080, at *3 (¶13) (Miss. Ct. App. Oct. 8, 2013), we stated:

Intent ordinarily must be inferred from the acts and conduct of the party and the facts and circumstances attending them. Even if intent is not expressly evident, it may be proven by showing the acts of the person involved at the time, and by showing the circumstances surrounding the incident. Whether a person intended to commit an act is a question of fact to be gleaned by the jury from the facts shown in the case. The presumption of the law is that each person intends the natural consequences of his actions.

(Internal citations and quotations marks omitted).

¶36. Prior to the shooting, Snowden’s stepson had called home and advised that he was being chased by some individuals. Snowden got his gun, a .22 rifle, and waited for his stepson to arrive. It is reasonable to assume that he believed that the individuals might chase his stepson home, and he wanted to be ready for his stepson’s pursuers should they be brazen enough to do so. When the pursuers did exactly what Snowden suspected that they

might do, he fired three shots—not one, not two, but three—in the direction of the pickup truck that the pursuers were in, which also was in the direction of Smith’s car. Since this occurred around 12:45 a.m., the heart of the night, it cannot be reasonably argued that Snowden did not or could not have seen the headlights of Smith’s vehicle, which was passing on the highway by Snowden’s driveway. On this evidence, the jury could reasonably conclude that when Snowden fired the three shots, he was attempting to shoot his stepson’s pursuers, notwithstanding his testimony that he was only attempting to scare them away and was not trying to shoot anybody. If that were the case, why would he not simply wait until Smith’s vehicle had passed and then shoot? The jury could reasonably assume that Snowden was angry and was attempting to get his stepson’s pursuers at all cost. Otherwise, why would he shoot toward a passing vehicle that was directly in his line of fire?

¶37. The majority says there is no evidence that Snowden fired directly at the occupants of the white pickup truck. I agree that there is no direct evidence of that, but there is adequate evidence from which the jury could have inferred that that was the case.

Snowden’s wife, Elayne, testified as follows:

I was out on the front porch waiting. And I saw my son pull in, I saw a car go past, and then the pickup truck came and started to turn into the driveway. That is when my husband fired the warning shots, and the truck stopped turning into the driveway and continued - - I started hearing more shots, and I looked over and realized, when I looked back at the pickup truck, there were red flashes coming from the guy with the pickup truck. That it was not Eddie shooting anymore. That was them shooting, and I just hit the patio.

* * * *

Q. And you say you saw your husband when he shot the gun. How did he hold the gun?

A. I did not actually see him holding the gun. I heard the shots and realized that that's what was - - because he was in front of the garage. The porch light does not reach over that way.

¶38. Snowden testified in pertinent part as follows:

Q. Why did you reach and get the rifle?

A. Because [my wife] had - - was talking to him. And said they were shining a laser light in his face, and the only thing I could figure of [sic] with a laser light would be on a weapon. And when they hit the car, they hit the glass on the passenger - - or driver's side about four inches from the post. If it'd been a little bit further, it would have come through the glass and hit him in the face.

Q. Okay.

A. But when they hit the car, I knew they intended bodily harm. And that's why I picked up the rifle and went outside. I mean, you don't go up and strike a car like that, moving, unless you intend to hurt somebody.

Q. And that's the only reason you - -

A. That's the only reason. I didn't know what these idiots had in mind or what, you know, but I knew if they come up to my house, I had to do something to protect my family.

* * * *

Q. Describe a warning shot?

A. Just pointed the rifle out and pulled the trigger. . . .

Q. And did you know anybody was on the highway - - on the Chunky-Duffy Road at the time you fired the gun?

A. No. Like I said, I was not firing at anybody. I was simply firing because I didn't know what the intentions of these people were that was coming after Chris. Had no idea what their mind was, other than the fact I knew they went - - meant bodily harm.

¶39. It is clear from the testimonies of Snowden and his wife that the jury, as noted, could

reasonably infer that he intended to shoot the occupants of the white pickup truck if the truck followed his stepson onto their driveway. First, based on Snowden's wife's testimony, the jury learned that Snowden stood where he could not be seen by the occupants of the truck, as the porch light did not shed light in the area where he stood, waiting with the rifle. This would indicate that Snowden was attempting to gain a tactical advantage in what he thought could develop into a shootout with the occupants of the truck. Second, it is a reasonable inference that if Snowden believed that the occupants of the pickup truck had a weapon and were attempting to cause bodily injury to his stepson, he would shoot to stop them, not simply fire several warning shots. Further, the jury heard evidence that Snowden's home is located on a hill that overlooks Chunky-Duffy Road, providing an unobstructed view of the road below. Therefore, based on the physical position of Snowden's home, Snowden would not have been able to strike anyone traveling on Chunky-Duffy Road if all he had done was raised his rifle and fired several shots. He had to aim his gun downward. Therefore, the physical evidence contradicts Snowden's testimony that he was not shooting at anyone and that he simply raised his gun and fired. A fair and impartial consideration of Snowden's testimony compels the conclusion that he was not attempting to fire only warning shots. He had concluded, prior to the white pickup truck turning onto his driveway, that the laser light that the occupants of the truck had shined in his stepson's face was attached to a weapon. Therefore, he believed them to be armed and dangerous.

¶40. Applying the law of transferred intent, the evidence was sufficient for the jury to find Snowden guilty of aggravated assault against Smith, even though he intended to shoot his stepson's pursuers instead. Clearly, this was the theory that the State pursued, because it

asked for, and the circuit court gave, the following instruction:

The Court instructs the jury that if one intends to injure a person with a deadly weapon, and by mistake or inadvertence injures another person with such weapon, his intent is transferred from the person to whom it was directed to the person actually injured, and he may be found guilty of aggravated assault. You may find a person guilty of aggravated assault even if that person intended to injure another.

The majority points to the State's closing argument in an attempt to discount the notion that the State's case was based on transferred intent, that is, that Snowden intended to shoot the occupants of the white pickup truck, not Smith. Suffice it to say that closing argument is not evidence. But there was sufficient evidence offered from which reasonable persons could infer that Snowden was attempting to shoot the occupants of the white pickup truck. The jury found Snowden guilty of aggravated assault against Smith. It could do that only if it also found that Snowden was attempting to shoot the pursuers of his stepson but failed, as there is absolutely no evidence that he was attempting to shoot Smith, nor is there any evidence from which that conclusion can be inferred.

¶41. For the reasons presented, I dissent. I would affirm the judgment of the circuit court.

LEE, C.J., AND CARLTON, J., JOIN THIS OPINION.